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From Civiletti

Dear [Redacted]

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The Criminal Code contains three provisions potentially relevant to [Redacted] situation. The most comprehensive provisions are 18 U.S.C. §§ 793 and 794 which punish the collection of national defense information of any description and its transmission to any person not authorized to receive it. In addition, these sections proscribe conduct which, while not itself espionage, could lead to compromise of national defense secrets. STAT

Subsection 793(d) prohibits, by persons lawfully having possession, "willful" communication of information relating to the national defense which the actor has reason to believe could be used to the injury of the United States or to the advantage of a foreign nation, and the "willful" retention of the same. The present wording of 793(d), encompassing

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one who "communicates", originated with the Espionage Act of 1917, and has survived without intervening change (40 Stat. 217).

In 1974, during congressional consideration of proposed legislation, the "Criminal Justice Reform Act", the Senate Judiciary Committee issued a Committee Report,^{1/} in which it was stated that the term "communicates" was intended as a broad concept applicable to any manner of communication of the type of information that Congress had determined should not be revealed. The Committee Report also notes that in the congressional debates (1917) on the Espionage Act it was observed that "communications" is a far broader concept than "publication", and that the term includes the general dissemination of such information through publication.

Additional support for this view can be found in New York Times Co. v. United States, 403 U.S. 713 (1971) (hereinafter referred to as New York Times). Although the District Court in that case, (a civil action), had ruled that "communication" did not include "publication", a view that was shared by Justices Douglas and Black, this view was rejected by Justices White, Stewart and Blackmun and by Chief Justice Burger, and was questioned by Justice Marshall.

While the foregoing discussion indicates that there is strong justification for the Judiciary Committee's belief that the word "communicate" as used in the pertinent law includes "publication", it should be noted that this issue has not been definitely decided. In New York Times, Justice Douglas stated, in dicta, that the statute, section 793(e), bars only non-published communication of information. Subsection 793(e) proscribes practically the same conduct as

^{1/} S. Rep. No. 92-0000, 93d Cong., 2d Sess., at 227 (1974).

subsection 793(d), except it applies to a person "having unauthorized possession of information" as contrasted to "lawfully having possession of information" in the latter instance. Of the present 8 sections in the chapter on espionage and censorship, 18 U.S.C. §§ 793-799, Justice Douglas noted, three specifically bar both communication and publication. Therefore he concluded, "it is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act."

Justice White noted that from the face of subsection 793(e) [this would also apply to subsection 793(d)] and from the content of the Act of which it was a part, it seems undeniable that a newspaper is vulnerable to prosecution under subsection 793(a) if it communicates materials covered by that subsection. However, he further stated that the District Court ruled that "communication" did not reach publication by a newspaper of documents relating to the national defense and added, "I intimate no views on the correctness of that conclusion." At best, then, the contrast between the firm belief of Justice Douglas that the use of the word communicate does not include publication, and Justice White's indecision, highlights the less than clear evidence of legislative intent.

The second relevant statute, subsection 794(a), prohibits communication of national defense information to a foreign nation with intent or reason to believe that it would be used to the injury of the United States or the advantage of a foreign power. Since in this subsection, the pertinent language with which we are concerned, "communicates information relating to the national defense", is the same as appears in subsection 793(d), the foregoing discussion is also applicable here. However, in contrast to subsection 793(d), subsection 794(a) proscribes communication to a foreign recipient.

Of course, the threshold question is whether publication of information relating to the national defense in a newspaper

that is certain to reach foreign hands is within the scope of the language of this subsection. Although the term "communication" might ordinarily be thought to comprehend all transmissions of information, including publication, both the language of 794(a) and the legislative history strongly indicate that the provision does not reach public speech, but rather concerns only that communication which occurs in typical espionage. While 794(a) prohibits communication of information, the word "publishes" appears in subsection 794(b) (effective in time of war) where both "communicates" and "publishes" are used. Thus, by implication, it can be logically asserted that the drafters thought that the latter mode of communication was not reached by subsection 794(a). Consequently, it cannot be stated with any certainty that "communication" as used in 794(a) includes "publication".

Turning now to section 798, the third and final statute involved in this discussion, it is apparent that although a few questions arise under this statute that yet has to receive judicial gloss, compared to sections 793 and 794 it is a model of precise draftmanship. Section 798 makes criminal knowingly and willfully communicating, transmitting, furnishing or publishing classified information relating to cryptographic and communications intelligence. The use of the term "publishes" makes clear that the prohibition is intended to bar public speech and writing. The statute and its history make evident that violation occurs on knowing engagement in the proscribed conduct, without any additional requirement that the violator be animated by anti-American or pro-foreign motives.

However, a potential problem arises from the fact that in defining what information is subject to restriction, classification becomes an element of the offense. Classified information is statutorily defined as that "which . . . is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted

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dissemination or distribution." On this point, both the Senate and House Judiciary Committee Reports state: "The bill specifies that the classification must be in fact in the interest of national security." Whether this means that the appropriateness of the classification would be a question of fact for the jury or a question of law for the Court is not clear and will not be settled, of course, until such time as this section is judicially construed. Presumably, the courts would give serious consideration to this indication of legislative intent with the result that in refuting a claim of improper classification the Government might have to reveal too much. All that can be said at this time is that in the initial prosecution under this section the Government would seek to persuade the Court that if testimony is offered that the information involved is of the kind defined in the statute and was classified, "for reasons of national security", the Court can itself determine whether it is protected by § 798.

Unfortunately, there are no Court cases deciding when publication of information by a newspaper is a sufficient threat to the national security so that criminal sanctions against such publication will be upheld as constitutional.

In sum, although the proposition is not free from doubt, in an appropriate factual situation, the Department of Justice would consider the prosecution under the Espionage Statutes of an individual who, without proper authorization, knowingly leaks classified national defense information to the media and would likewise consider the prosecution of one who, knowing such information to be classified information at the time he receives it, publishes the same.

Very truly yours,

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